IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 19TH FEBRUARY 2007 / 30TH MAGHA 1928

SA.No. 278 of 1994(G)

AS.129/1989 of D.C. & SESSIONS COURT,KOLLAM
OS.58/1984 of PRINCIPAL SUB COURT,KOLLAM

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APPELLANT: 1ST RESPONDENT/PLAINTIFF

PHILOMINA JOHNY, MARGRET VILLA,
ASRAMATHU CHERI, CANTONMENT NORTH,
KOLLAM.

BY ADV. SRI.K.K.GOPINATHAN NAIR
SRI. K.P.SATHEESAN
T.S.RAJASENAN

RESPONDENTS: APPELLANT & RESPONDENTS 2,3 & 5 TO 7:DEFENDANTS 1 TO 3

AND 5 TO 7

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1. POULINE THOBIAS FERNANDEZ, SHERLINGDON, CANTONMENT NORTH, KOLLAM-1.

2. DOLLY VARGHESE, VINCILIL VEEDU, KADAPPAKKADA, KOLLAM.

3. DORIS MELVIN, PRIYA VEEDU, PATTOM, KESAVADASAPURAM, THIRUVANANTHAPURAM (STENOGRAPHER, LABOUR COMMISSIONER'S OFFICE, THIRUVANANTHAPURAM).

4. MARK PEREIRA STEPHEN PEREIRA, S.M. COTTAGE, PANDAKASAL, CHIRAYINKIL, THIRUVANANTHAPURAM.

5. MARK PEREIRA CHRISTOPHER PEREIRA, MARK VILLA, ASRAMAM NORTH, KOLLAM.

6. JOJIYANA, MARGRET VILLA, ASRAMAM, CANTONMENT NORTH WARD, KOLLAM.

BY ADV. SRI.BABU JOSEPH KURUVATHAZHA-R1,2 AND 3.

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 19/02/2007, THE COURT ON THE SAME DEAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

S.A.278 OF 1994.

JUDGMENT

19.02.2007.

M.SASIDHARAN NAMBIAR,J.

S.A.NO.278 OF 1994

DATED THIS THE 19th DAY OF FEBRUARY, 2007

JUDGMENT

Plaintiff in O.S.58/84 on the file of Sub Court, Kollam is the appellant. Respondents are the defendants. Appellant is the widow of deceased Johny, the brother of respondents 1 to 6. Their marriage was on 20.2.1974. Johny was then working in Abudabi. Johny admittedly died in an accident at Abudabi on 6.8.82. Plaint schedule property having an extent of ten cents admittedly originally belonged to Johny under Exts.A2 and A3 sale deeds dated 8.4.76 and 19.7.1979. Appellant filed the suit to set aside Ext.A5 registered sale deed executed by Johny in favour of his sister first defendant. Ext.A5 was executed on 15.7.81. As per Ext.A5, plaint schedule property was sold by Jonhy in favour of first defendant for a consideration of Rs.15,000/-. Sale deed was sought to be set aside alleging that it was vitiated by fraud and undue influence. First respondent in her written statement disputed the allegations and contended that Ext.A5 was voluntarily executed by deceased Johny and it is a valid document.

2. Learned Munsiff framed the necessary issues. Apart from examining herself as PW3, appellant examined two witnesses and

PW5, the Commissioner and PW4, the engineer. Respondents examined three witnesses including first defendant as DW3. Eleven exhibits were marked on the side of respondents and twenty five exhibits on the side of defendants, apart from Ext.X1,X2 and C1 to C3. Learned Munsiff on the evidence found that Ext.A5 sale deed is vitiated and set aside the sale. A decree for permanent prohibitory injunction was also granted. First defendant challenged the decree and judgment before District Court, Kollam in A.S.129/1989.

3. Learned Additional District Judge on re-appreciation evidence set aside the decree and judgment of the trial Court and holding that Ext.A5 is not a sham document and is not vitiated by either fraud or undue influence held that it cannot be set aside as sought for. Appeal was allowed and decree and judgment passed by the trial Court were set aside and the suit was dismissed. It is challenging the dismissal of the suit by allowing the appeal, plaintiff has preferred the second appeal.

4. The appellant contended that first appellate Court did not properly appreciate the evidence or the case and should have found that Ext.A5 was only a sham and nominal document and it was vitiated by undue influence. It was contended that the first appellate Court should have found that the consideration shown in Ext.A5 is disproportionately unconscionable and there was no necessity for deceased Johny to execute the sale deed and therefore

the decree and judgment of the first appellate Court is to be set aside.

5. It is seen that, though notice was ordered in the appeal on 11.3.94, substantial question of law was not formulated before issuing notice.

6. Learned Counsel appearing for appellant and respondents were heard.

7. Though it was contended by appellant that plaint schedule property was purchased by Johny making use of the funds of appellant also, learned Munsiff and learned District Judge on the evidence found that appellant did not establish that the funds of appellant were used for purchasing the property under Ext.A2 and A3. Nothing was pointed out to hold that the factual finding arrived at by the Courts below on that point was either ignoring the evidence or by mis appreciating the evidence. Findings of Courts below that Plaint schedule property was purchased by Johny out of his own funds under Exts.A2 and A3 cannot be challenged in the second appeal, in the light of the evidence.

8. As per Ext.A5 registered sale deed executed on 15.7.1981, Johny sold plaint schedule property to first respondent for a total consideration of Rs.15,000/-. Learned Munsiff on the evidence found that the consideration is insufficient. But it was also found that past consideration is sufficient for execution of the sale

deed and for the failure to establish the sale consideration, the sale deed cannot be set aside. But it was found that the conduct of first defendant is not free from suspicion and the letters produced by defendants establish that defendants 1 to 3 were manipulating things in such a way to see that appellant is suspected by her husband about character and Johny had reposed much confidence in first defendant which indicate that taking advantage of the said influence Ext.A5 sale deed was executed. On this finding learned Sub Judge set aside Ext.A5 sale deed. Learned District Judge on re-appreciation evidence found that though Ext.A5 was challenged on the ground of undue influence and fraud, details were not pleaded as provided under Rule 4 of Order VI of Code of Civil procedure and on the evidence it cannot be said that Ext.A5 sale deed is vitiated. It is for that reason learned District Judge set aside the finding of learned Sub Judge.

9. Arguments of learned Counsel appearing for appellant was that Ext.A5 is vitiated. It was argued that it is a sham document. Argument was that even after the death of Johny, appellant continued residence in the plaint schedule property which shows that possession of the property was not handed over to first defendant as stated in Ext.A5 and it proves that the sale deed was not acted upon and was only a sham document. It was also argued that when the evidence establish that the building itself will cost

more than Rs.75,000/- the total sale consideration shown under Ext.A5 is only Rs.15,000/- and it is unconscionably inadequate, which shows that it is only a sham document. Learned Counsel also argued that there was no necessity for deceased Johny to execute the sale deed and that too after constructing the residential building, which was almost completed and in such circumstances, the judgment of the trial Court is to be restored .

10. On hearing the arguments of learned Counsel appearing for appellant, I do not find any substantial question of law involved in this appeal. The question is only on the appreciation of evidence. Ext.A5 sale deed is challenged, as per the pleading, on the grounds of fraud, undue influence and also on the allegation that it is a sham and nominal document. The details of fraud and undue influence was not pleaded as rightly found by learned District Judge. Ext.A5 sale deed was executed by the brother in favour of his sister. Therefore want of sufficiency of the consideration by itself is not a ground either to hold that the sale deed was a sham and nominal document or to hold that the sale deed is vitiated. Though it was contended that the sale deed was executed by the undue influence of first defendant apart from raising a case of suspicion as found by learned Sub Judge, no satisfactory evidence was adduced to prove that Ext.A5 was vitiated by undue influence. The same is the case with the case of sham and nominal document raised by the

appellant.

Learned District Judge appreciated the evidence in the proper perspective and exercising jurisdiction under Section 100 of Code of Civil Procedure the factual finding cannot be interfered. No substantial question of law is involved in the second appeal. Second appeal is dismissed.

M.SASIDHARAN NAMBIAR,JUDGE

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